

Nos. 83-866, 83-885

**In the
Supreme Court of the United States**

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OCTOBER TERM, 1983

BOSTON FIREFIGHTERS UNION, LOCAL 718,
PETITIONER,

v.

BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
RESPONDENTS.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
PETITIONER,

v.

PEDRO CASTRO, ET AL.,
RESPONDENTS.

**Brief of Respondents in Opposition to Petitions
for a Writ of Certiorari to the United States
Court of Appeals for the First Circuit**

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Question Presented

Should the Supreme Court review the decision of the court of appeals holding that the controversy is moot, where that decision is based upon well established principles of federal jurisdiction, and where petitioners' challenge to the decision is based upon asserted matters of fact which are not in the record below and upon the pendency of state administrative proceedings which are governed by state law?

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Opinions Below

Respondents agree with the identification of Opinions Below stated in the petitions for certiorari, but note that the consolidated opinion on remand of the United States Court of Appeals for the First Circuit has been reported at 716 F.2d 931 (1st Cir. 1983).

Constitutional and Statutory Provisions

The petitions involve U.S. Const. Art. III, § 2, cl. 1, which is reproduced at page 8a of the Appendix to the petition of Boston Firefighters Union, Local 718.

The statutes involved are 1982 Mass. Acts, c. 190, § 25, which is reproduced at page 9a of the Appendix to the petition of Boston Firefighters Union, Local 718, and Mass. Gen. Laws c. 31, § 43, which is reproduced at page 1a of the Appendix to this brief.

Statement of the Case

These petitions seek to have the Court grant certiorari in order to decide a question of mootness which the Court has already heard and committed to the court of appeals. Petitioners challenge a decision which accords fully with established mootness doctrine and seek review based upon claims which rely upon matters of fact not in the record below and the pendency of state administrative proceedings which are governed by state law.

A. Prior Proceedings

The decision of the court of appeals found moot a controversy which arose in the course of ongoing judicial administration of relief in consolidated employment discrimination cases relating to Boston's police and fire departments. The cases have lengthy histories, with which the Court is familiar. See Supreme Court Nos. 82-185, 82-246, 82-259. The controversy which the court of appeals found moot, however, was more recent and short-lived.

In July 1981, in response to an asserted fiscal crisis, the City of Boston instituted a massive reduction in force program in its police and fire departments. The program was to be administered in accordance with the Massachusetts civil service statute, which requires layoffs in reverse order of seniority. Black and Hispanic police officers and firefighters challenged the application of the seniority statute to the layoff program by applying to the district court for modification of prior court orders in order to prevent the City from reducing their proportional representation below the levels obtaining at the time the program commenced.

The minority officers' requests for modification were opposed by the state civil service officials and intervening unions. They were not opposed by the City or its police and fire commissioners.

The district court held that the application of the Massachusetts seniority statute to the layoff program would interfere with the court's ongoing remedial process. By orders dated August 7, 1981, the court enjoined the police and fire commissioners from reducing the percentage of minority officers obtaining at the commencement of the layoff program.

The court of appeals affirmed.

B. *The Political Resolution*

In June 1982 Massachusetts enacted legislation resolving the City's asserted fiscal crisis and rescinding the reduction in force program. 1982 Mass. Acts c. 190. The statute, known as the Tregor Act, provided the City with new funds and required the reinstatement of all police officers and firefighters who had been laid off as a result of the reduction in force program. The Tregor Act also provided that the City shall not terminate or otherwise separate any reinstated personnel from active service "in the future for lack of funds." *Id.* § 25. Finally,

the Act required the maintenance of minimum staffing levels in the police and fire departments through June 30, 1983. *Id.* As a result of the Tregor Act, the police and fire departments reinstated, or offered to reinstate, all personnel terminated during the City's 1981 reduction in force program.

C. *Disposition by the Supreme Court*

Following enactment of the Tregor Act, the police and fire unions and the state civil service officials petitioned for certiorari. The Court granted certiorari, and on April 18, 1983 the Court heard oral argument on the merits. In their brief on the merits and at oral argument, the minority officers argued that the controversy giving rise to the lower courts' decisions had become moot.

On May 16, 1983, the Court issued a per curiam opinion which vacated the judgment of the court of appeals and remanded the cases for consideration of mootness in light of the Tregor Act. *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP, Inc.*, 51 U.S.L.W. 4566 (U.S. May 16, 1983).

D. *The Court of Appeals' Opinion on Remand*

On August 31, 1983, in a per curiam decision, the court of appeals held that the minority officers' motions to modify the prior remedial decrees were moot. *Boston Chapter, NAACP v. Beecher*, 716 F.2d 931 (1st Cir. 1983). The court vacated the district court's August 7, 1981 orders and remanded the cases to the district court to dismiss as moot the motions for modification.

The court of appeals held that "to avoid mootness a case must present both live issues and parties with legally cognizable interests." *Id.* at 933. In light of the Tregor Act's mandatory reinstatement of all laid off officers and its requirement of minimum staffing levels through June 1983, the court of appeals

concluded that the minority officers "now lack the 'personal stake' necessary to keep alive the controversy which engendered this proceeding." *Id.*

Before the court of appeals, the unions had argued that non-minority officers' claims for back pay which were pending before the Massachusetts Civil Service Commission kept the controversy alive. In response, the court of appeals stated that since the minority officers no longer had any personal stake in the controversy, a ruling by the federal court "would amount to no more than an advisory opinion." *Id.*

The court of appeals also rejected the state civil service officials' argument that the controversy remained alive because the district court's orders allegedly prohibited the Massachusetts Civil Service Commission from adjudicating the back pay claims. The court noted that "[a]ccording to the established practice of the federal courts, when a case is found moot, the district court's judgment will be vacated." *Id.* Therefore, even assuming that the district court's orders inhibited the Commission's adjudication, "[they] will no longer do so." *Id.* The civil service officials, notably, have not petitioned for certiorari.

Reasons for Denying the Writ

I. THE COURT OF APPEALS' MOOTNESS DECISION DOES NOT WARRANT REVIEW

Petitioners seek certiorari review of a decision which does not warrant such attention. The decision of the court of appeals addressed only a question of mootness, and the resolution of that question is unlikely to have impact beyond the confines of these cases.

Indeed, even within the confines of these cases, the decision of the court of appeals had an impact which was palliative only.

The court of appeals found the controversy originally before it to be moot. That court, just as had the Court previously, followed the "established practice" for treating civil cases which become moot while on appeal and vacated the lower court's orders. See *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Thus the continuing mandate, and even precedential significance, of the district court and court of appeals' prior decisions have been eliminated.

II. THERE IS NO CONFLICT WITH PRIOR DECISIONS OF THE COURT, FOR THE DECISION OF THE COURT OF APPEALS IS BASED ON WELL ESTABLISHED PRINCIPLES OF FEDERAL JURISDICTION

The court of appeals held that the controversy is moot because the minority officers no longer have any personal stake in the outcome. It is a fundamental principle of federal jurisdiction that all parties must retain a personal stake in the resolution of a controversy; hence review of a decision based on this principle is not warranted.

In order to satisfy the case or controversy requirement of Article III, a complaining party must show "an injury to himself which is likely to be redressed by a favorable decision." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976). Without any present or threatened injury, a party has no personal stake in a controversy, and the court cannot be assured of "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional issues." *Baker v. Carr*, 369 U.S. 186, 204 (1962). As the Court stated in *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980), "the purpose of the 'personal stake' requirement is to assure that the case is in a form capable of judicial resolution."

As a result of the Tregor Act, minority officers no longer risk loss of their jobs due to application of the seniority statute to

the City's now abandoned layoff program. The court of appeals found that the threat of injury to the minority officers which had originally created a live controversy is now removed. The court concluded that the minority officers "now lack the 'personal stake' necessary to keep alive the controversy which engendered this proceeding." *Boston Chapter, NAACP v. Beecher*, *supra*, 716 F.2d at 933.

In their petitions for certiorari, the unions argue that state law claims of reinstated non-minority officers which are assertedly pending before the Massachusetts Civil Service Commission are sufficient to keep the federal controversy alive. The minority officers, however, are not parties to the state administrative proceedings and have no stake in their resolution. Since the minority officers have no stake in the resolution of someone else's back pay claims, the existence of those claims cannot create a live controversy involving the minority officers. See *Flast v. Cohen*, 392 U.S. 83, 99 (1968). A decision by the federal court, rendered in the absence of a present case or controversy between the unions and minority officers, "would amount to no more than an advisory opinion." *Boston Chapter, NAACP v. Beecher*, *supra*, 716 F.2d at 933.

Indeed, two of the three parties with a real interest in the back pay proceedings are not even before the Court. The state has not filed a petition for certiorari; and the City, which is the only party with an interest adverse to the union members' claims for back pay, has never taken any position on the merits of the federal issues during the entire course of federal court proceedings. If the only controversy which persists is the union members' claims for back pay, that controversy is best resolved in the state administrative proceedings where the parties with truly adverse interests can advocate their respective positions.

III. PETITIONERS' CLAIMS DEPEND UPON MATTERS OF FACT NOT IN THE RECORD AND UPON QUESTIONS OF STATE LAW

The petitions are based on factual matters which are not in the record and on questionable interpretations of state law. The Court should decline review under these circumstances.

The unions' petitions are premised on the assertion that a federal court decision on the merits will affect the resolution of the union members' claims for back pay. See Fire Petition at 7; Police Petition at 11. This assertion cannot be adequately evaluated by the Court, however, for the record below contains virtually no information relating to claims of non-minority officers for back pay or the status of any Massachusetts Civil Service Commission proceedings relating to such claims. There was before the court of appeals, to be sure, an assertion that back pay claims had been brought by some officers. Beyond that, however, there is nothing in the federal court record reflecting the nature of the claims assertedly made in the administrative proceedings, identifying the issues raised by the parties who are participating in those proceedings, discussing the state law applicable to those claims or clarifying the present stage of the proceedings.¹ In this regard, the unions' petitions are notably devoid of any record citation which would disclose what is taking place in the state administrative proceedings or reveal how a federal court decision would influence the outcome of those proceedings.

In any event, the back pay claims must be made under state law, and it is likely that the Civil Service Commission will resolve, or already has resolved, those claims without requiring

¹ The minority officers, in fact, understand that on February 11, 1982, the Civil Service Commission denied the police officers' claims for back pay, and that no appeal was taken from that decision to the state superior court. Consequently, it would appear that there is no proceeding, of any sort, presently pending with respect to the impact of the layoff program on police officers.

any disposition of the federal issues raised in the federal court proceedings. If resolution of the federal controversy is unnecessary to disposition of the union members' claims for back pay, then even the unions would have no basis to claim a continued interest in the outcome of the federal proceedings.

Presumably the issue raised in civil service proceedings is whether layoffs were "justified". Mass. Gen. Laws c. 31, § 43. This is an issue of Massachusetts law, not federal law. To the extent, moreover, that the administrative proceedings might inquire into whether layoffs in compliance with a federal court order are justified, Massachusetts law, as well as federal law, indicates that there is no likelihood that federal appellate review, even reversal, would have any bearing upon civil service claims. The layoffs were accomplished pursuant to outstanding federal court orders. As such, they were justified at the time they were implemented. This justification cannot be lost by any subsequent reversal of the orders. A court order validly entered, when the court has both subject matter and personal jurisdiction, gives rise to a plain legal duty to obey until it is stayed, vacated or reversed. See *Town of Stow v. Marinelli*, 352 Mass. 738, 743-44, 227 N.E.2d 708, 713 (1967); *Maness v. Meyers*, 419 U.S. 449, 458-59 (1975); *United States v. United Mine Workers of America*, 330 U.S. 258, 293 (1947).²

² The Firefighters Union asserts that the court of appeals found that resolution of the federal law issues "will influence" the disposition of the back pay claims. Fire Petition at 7. This mischaracterizes the opinion of the court of appeals. The court merely assumed *arguendo* that a federal court decision "might facilitate" the resolution of the back pay claims, and held that in any event, "such a ruling now — rendered in the absence of a present case or controversy — would amount to no more than an advisory opinion." *Boston Chapter, NAACP v. Beecher*, *supra*, 716 F.2d at 833.

Conclusion

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix

MASSACHUSETTS GENERAL LAWS

Chapter 31, § 43

If a person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, so request in writing to the commission, he shall be given a hearing before a member of the commission or some disinterested person designated by the chairman of the commission. Said hearing shall be commenced in not less than three nor more than ten days after the filing of such request and shall be completed within thirty days after such filing unless, in either case, both parties shall otherwise agree in a writing filed with the commission, or unless the member or hearing officer determines, in his discretion, that a continuance is necessary or advisable. Upon completion of the hearing, the member or hearing officer shall file forthwith a report of his findings with the commission. Within thirty days after the filing of such report, the commission shall render a written decision and send notice thereof to all parties concerned.

The commission shall affirm the action of the appointing authority if it finds that such action is justified. Otherwise it shall reverse such action, and the person concerned shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.

Any hearing pursuant to this section shall be public if either party so requests in writing. The person who requested the hearing shall be allowed to answer, personally or by counsel, any of the charges which have been made against him.

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The decision of the commission made pursuant to this section shall be subject to judicial review as provided in section forty-four.

Saturdays, Sundays and legal holidays shall not be counted in the computation of any period of time specified in this section.

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